UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TECNOCAP LLC

and Case 06-CA-216499

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO

Clifford Spungen, Esq., for the General Counsel
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Maneesh Sharma, Esq., (United Steel Workers), Pittsburgh, PA, for the Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Wheeling, West Virginia on February 12, 2019. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) alleges that Tecnocap LLC (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act[1] by announcing to unit employees that it would lockout only those unit employees who were members of the Union and by impliedly soliciting its employees to resign their membership in the Union in order to continue working during the planned lockout of members of the Union. In addition, the complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by locking out its employees who were members of the Union, while permitting its employees who were not members of the Union to continue working. Finally, the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by insisting as a condition of reaching any collective-bargaining agreement that the Union agree to change the scope of the bargaining unit, a permissive subject of bargaining, and by partially implementing its last best and final offer by expanding the bargaining unit without the consent of the Union; by bypassing the Union and dealing directly with its employees by soliciting its employees to enter into individual employment contracts with Respondent in order to work during the lockout of employees who were members of the Union; and by, during the partial lockout, failing to inform the Union of the terms under which the partial lockout could be ended.

[1] 29 USC §§ 151-169.

The Respondent denies the allegations and asserts that it attempted to resolve critical production problems with the Union by negotiating the reorganization of personnel, but the Union never made a counterproposal and the parties reached contractual impasse.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation with an office and place of business in Glen Dale, West Virginia, is engaged in the manufacture and nonretail sale of container closures valued in excess of $50,000 annually, which goods it sells and ships directly to customers located outside the State of West Virginia, and purchases and receives materials valued in excess of $50,000 directly from points outside the State of West Virginia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations*

The Respondent manufactures customized and stock steel and aluminum closures at its plant in Glen Dale, West Virginia. The Respondent was incorporated in 1999 and has operated the Glen Dale facility since 2006. Paolo Ghigo is the Respondent's president; Darrick Doty is director of human resources; and Ric Smith is plant manager. All are statutory supervisors within the meaning of Section 2(11) of the Act and agents within Section 2(13) of the Act.

B. *The Two Unions*

The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly rated production and maintenance employees, including warehousemen; except employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

Since at least 2006, the Respondent has recognized the Union and its Local Union. No. 152M Wheeling, West Virginia, AFL-CIO, CLC, formerly known as Glass, Molders, Pottery, Plastics & Allied Workers International Union, and its Local Union No. 152, AFL-C1O, CLC (GMP), as the exclusive collective-bargaining representative of the Unit. Unit employees were subject to the terms of a collective bargaining agreement (GMP CBA) between Respondent and the Union, effective by its terms from November 29, 2015 through and including November 18,

2017, and voluntarily extended through and including February 28, 2018.[2] The most recent collective-bargaining agreement is effective from March 21, 2018 to September 30, 2019.

The GMP and its constituent local unions, including Local Union 152, merged into and became a part of the Union pursuant to a merger agreement between the GMP and the Union, dated January 21, 2016, with an effective date of January 1, 2018 (Merger Agreement). The Merger Agreement provided that the merger shall not interrupt or in any way change the continuity of collective bargaining agreements and that effective January 1, 2018 all powers, rights, privileges, benefits, authority, duties and responsibilities vested in the GMP and its Local Unions pursuant to bargaining rights and certifications and collective bargaining agreements to which the GMP and/or its Local Unions are a party or beneficiary as of said date, and the right to enforce same, were vested in the Union and its locals as though they and not the GMP and its local unions had originally been named as a party thereto or beneficiary thereof. As a result of the Merger Agreement, GMP Local Union 152 was chartered as the Union's Local Union 152M.

Since at least 2006, all tool & die makers, machinists, electricians, die setters, millwrights and their apprentices employed by Respondent at Respondent's facility have been represented by the International Association of Machinists and Aerospace Workers Local 818 of District 51 (IAM). The IAM bargaining unit consists of "all employees engaged in the making, assembling, erecting, dismantling, installing, testing and repairing of all equipment and/or parts thereof; including production equipment set-up, repair, lubrication, finished part specification conformance, and operational monitoring, of all descriptions." Most recently, employees represented by the IAM were subject to the terms of a collective bargaining agreement (IAM CBA) between the Respondent and the IAM, effective by its terms from April 6, 2015 through and including April 8, 2018.[3]

C. *Coverage of Bargaining Unit Work During Lunch and Breaks*

The Respondent's operations rely on continued production at all times. Covering the work of production employees during lunch and break periods, however, has long been a difficult issue to resolve. The Respondent sought to address that issue during its contract negotiations with the IAM in 2015. At that time, the parties executed an agreement permitting IAM-represented employees in the die setter classification to provide lunch and break coverage for production employees represented by the Union in the event that the Union agreed to allow IAM-represented employees to perform such work.

On March 18, 2016, the Respondent, the IAM and the GMP met to discuss issues of continuity of production but were unable to reach an agreement on the use of IAM-represented employees in the die setter classification during the lunch and break periods of Unit employees.

Notwithstanding the lack of an agreement with the GMP, between March 31 and May 11, 2016, the Company assigned IAM-represented employees in the die setter classification to provide lunch and break coverage for production employees represented by the Union. In response, both the Union and the IAM filed separate grievances. On December 10, 2016 an

[2] Jt. Exh. 1-2.
[3] Jt. Exh. 3.

arbitrator issued a decision concerning the grievances filed by the IAM. Following the arbitrator's decision in the IAM case, the Union withdrew its grievances on the same issue.[4]

D. *Bargaining Over Operator Classifications*

The most recent bargaining for a successor collective bargaining agreement between the Respondent and the Union commenced on October 30, 2017. Bargaining sessions were held on October 30 and 31, 2017; November 1, 9, 10, 13, 14 and 15, 2017; December 1 and 6, 2017; January 12, 17 and 19, 2018; February 12, 14, 15 and 28, 2018; and, March 9 and 19, 2018.

During the bargaining sessions, the Union was represented by Local Union president Lisa Wilds, vice president Dennis Lattocha, recording secretary Kathy Paske, business committee chairman Gerry Cunningham, and international representative Marvin Jacks.

During the bargaining sessions, the Respondent was represented by director of human Resources and lead negotiator Derrick Doty, plant manager Ric Smith, legal counsel Bradley Shafer and, at meetings in 2017, former director of human resources Charles Thomas. The Respondent's president Paolo Ghigo attended the bargaining session on March 19, 2019.

As part of contract negotiations between the Union and the Respondent, the latter prepared job descriptions for jobs titled Operator 1, Operator II, and Operator III, dated October 25, 2017, and provided copies of the same to the Union's bargaining team.[5] At the outset of negotiations, the Respondent informed the Union it intended to move into the Unit some of the duties performed by IAM-represented employees in the die setter classification.

During the bargaining session held on November 9, 2017, the Respondent proposed reducing the number of job classifications in the Unit from fourteen to three, to be known as the Operator I, II and III classifications. The Respondent proposed placing all employees in the Unit into the Operator I and II classifications. The Respondent further proposed placing some die setter employees represented by the IAM and their duties into the Operator III classification.

On November 15, the Respondent and the Union signed a Memorandum of Agreement (MOA) to extend the current bargaining agreement to February 28, 2018. By the terms of the MOA, the Union accepted the creation of Operator I, II and III job classifications with the caveat that negotiations would "continue as to red-circling, grandfathering, and who falls in what class."[6] The MOA made no mention of the die setter position or the job descriptions proposed by Respondent. Nor was agreement reached as to which jobs would go into which classification, or whether the Operator III classification would be filled by Union-represented employees or IAM-represented die setters.[7]

[4] Jt. Exh. 5.

[5] Jt. Exh. 4.

[6] Jt. Exh. 5 at 3.

[7] Wilds' credible testimony that the Union agreed to the three classifications, but only for the duration of the extension agreement, was not disputed. (Tr. 78.)

The Respondent and the Union continued to meet and exchange proposals over the next few months. Throughout negotiations, the Respondent consistently maintained that "it is the company's intention to move the die setters to class 3 operator, something which has been discussed at length in negotiations." The Union did not agree and instead proposed on February 12, 2018 to place four current Union-represented unit jobs into the Operator III classification.[8]

During the parties' contract negotiations session on February 15, the Respondent rejected the Union's proposal to staff the Operator III classification with Unit employees and presented the Union with its first "Last and Final" offer. The offer included a proposed new Section 4 to Article 33 of the CBA:

> It is expressly recognized that changing of dies and other processes that take a line out of production are time sensitive operations. Accordingly, the parties agree that management has the absolute discretionary right to assign employees of its own choosing to perform these tasks without regard to job classification or union membership.[9]

In addition, the Respondent delivered to the Union a document listing bargaining unit members and their proposed wage rates. The only employee reclassified as an Operator III was Scott Shimp, an IAM-represented die setter.[10] On February 21, the Union informed the Respondent that its February 15 contract proposal was rejected in a February 18 vote by the membership but urged continued bargaining:

> The GMP Council of the USW and Local Union 152 remain ready, willing and able to meet with Tecnocap to continue to bargain until we are able to successfully agree upon a successor collective bargaining agreement. We believe that if each party comes to the table with a genuine desire to reach an agreement the parties will be able to agree upon a successor agreement with further negotiations. Please reach out to me regarding the Company's availability for further contract negotiations. The Union will be prepared to submit a new proposal on the first day that we are able to get back together. As you know, the contract extension expires on February 28, 2018. It is important that all efforts be made to get back together for negotiations before February 28th. However, if the contract should expire prior to an agreement on a successor agreement, the Union is willing to continue to work on and after March 1, 2018 under all of the terms and conditions of the expired collective bargaining agreement and our members will report to work on March 1, 2018 with this understanding absent written communication to the contrary. However, this does not in any way waive the right of the Union to go on strike if the Union believes that circumstances warrant that action. We remain optimistic that further negotiations will result in a successor agreement, thus avoiding any issue of a work stoppage. l look forward to hearing back from you with proposed new dates.[11]

[8] GC Exh. 3; Jt. 22 at 2.
[9] Jt. Exh. 6.
[10] Jt. Exh. 7.
[11] Jt. Exh. 8.

The next meeting was scheduled for February 26. On February 25 at 7:07 p.m., however, the Respondent disputed the Union's characterization as to the status of the negotiations and advised that it was preparing to declare an impasse:

> After reviewing the unions proposals, and given the lack of movement, the company has decided to cancel for tomorrow. If/when the union has a response and desires to meet, call and we will come. Otherwise, it appears the union is unable to make any moves of substance and if that is the case, maybe time better spent with union committee having some serious discussions about either accepting proposals or making proposals that address the needs/issues the company has laid out to be solved. The contract expires at midnight on Feb 28. We presented the company's best and final offer on February 15. At this late stage, simply reiterating that the Union's position has not changed and submitting "CCL" round after round is not viewed by the company as negotiating in good faith and such Proposals are not productive in the effort to reach an agreement. As per your letter dated February 21st, we discussed Friday about the union not working under expired contract language but will instead work pursuant to language that has been agreed upon or on which we have reached impasse. As for the information request, the company has previously supplied all information to you either verbally, electronically, or hard copy.[12]

On February 26 at 5;04 p.m., the Union replied by asserting that the changes in the Respondent's position amounted to regressive counteroffer:

> The Union's most recent proposal contained numerous meaningful changes and concessions which you ignore in your e-mail. The Union modified its wage demands by fifty cents ($0.50) in each year in both classifications, it addressed the Company's concerns about hours of work and overtime for employees who work over early in the week and then report off on Fridays, and it modified the bidding procedure to address the Company's concerns. To the extent you reference the Union proposing "CCL" we assume you are referencing Articles 27 and 28 of the CBA. As you know, the parties agreed to TA Article 27 and then the Company, in an act of regressive and bad faith bargaining, proposed to remove both Article 27 and 28 entirely from the successor agreement after having agreed to Article 27. The Union proposal simply returns Article 27 to the agreed to status. Your statement that there has been a "lack of movement" or that the Union has failed to make "moves of substance" is simply untrue. The Union appeared this morning at the designated time and place ready to bargain. The Company failed to appear. The Union remains ready and willing to continue to negotiate with the Company on a successor agreement. Please send dates of your availability to continue negotiations for successor agreement.[13]

On February 27 at 10:09 AM, Doty responded to Jacks, disputing his assertions and maintaining that the parties remained at impasse on the major issues:

> We completely disagree with your arbitrary conclusions in your letter dated February 26, 2018, which we found profoundly erroneous and without evidence whatsoever. We

[12] Jt. Exh. 9.
[13] Jt. Exh. 10.

> would like to remind that your pointless moves, as we see them, are irrelevant to achieve an agreement. We were shocked this morning to understand that you hadn't informed the local Union members of the cancellation of the meeting. We completely understand that things like that happen when an inconsistent last minute proposal, as we see it, is submitted only the day before the meeting. We don't argue with your genuine desire to reach an agreement but we continue to register impasse on the three following main points:
>
> Three job classifications. Please be reminded that the three job classifications have been the main point on which extension was granted in November. Unfortunately yes, more than three months ago and we don't really know how to interpret your recent genuine objections on those.
>
> Seniority- Reiterating CCL is unacceptable. The company has informed you of the issues and yet, you have not proposed a reasonable solution.
>
> Grievance/Arbitration process – We took language suggested by Lewis' arbitrator who made it sound like limiting the arbitrator power was customary and standard language in contracts. Only when the union refused to agree to the arbitrator language did we say strike the whole thing.
>
> Finally, please be reminded that all of your requests have been already addressed, either verbally, electronically, or by hard copy after the non-disclosure agreement was signed and no more information will be released. Nevertheless, we are available to meet at your earliest convenience on Wednesday.[14]

The parties resumed bargaining on February 28 and the Respondent delivered to the Union a final proposal entitled "Company response to Union's Response to Company's Last & Final 2/26/18."[15] Jacks responded by handing Doty a one-paragraph document setting forth the Union's long-standing position regarding the Operator III classification:

> The third job classification which the Company is insisting upon in bargaining consists exclusively of work that is not in the GMP Council/USW bargaining unit and does not belong to the GMP Council/USW. All of the work in this 'third job classification' belongs to the IAM. The GMP Council/USW has repeatedly advised the Company that there is no basis for the parties to bargain over this third job classification which does not belong to the GMP Council/USW. This is an improper subject for bargaining. To the extent that the Company considers this a permissive subject of bargaining you are advised that the GMP Council/USW does not wish to bargain on this issue. You appear to believe that the Company can bargain to impasse over this issue. You are incorrect.[16]

On March 1, the Respondent posted a notice on the employee bulletin board informing Unit employees that the parties were at impasse and jobs classifications were being changed:

[14] Jt. Exh. 11.

[15] Jt. Exh. 13.

[16] Jacks' credible testimony that he handed the paper to Doty was not disputed. (GC Exh. 2; Tr. 76-78, 101-102.)

> The parties have attempted to reach an agreement without success. While we hope an agreement can be reached, business must continue. In the meantime, you are working without a contract.
>
> During this time many of the benefits and agreements from to expired contract will continue in effect. Further, new items upon which an agreement has been had will also be implemented.
>
> Effective today, the jobs are organized into three classifications only. Everybody is excited for the simplification offered by the new organization, which is expected to enable our company achieve the performance necessary to continue to thrive and compete into the global market. As with any transition or change, many questions may arise. Please feel free to address those questions directly to Darrick Doty.
>
> Finally, it is the Company's understanding that a vote is being scheduled on the last, best, and final offer. You are encouraged to get in touch with your union representatives and become personally informed of the terms and conditions of the proposal. As always I'm at your disposal to try to answer any questions you may have.[17]

On the same day, the Respondent implemented its proposal to create three job classifications, Operator I, Operator II, and Operator III. Unit employees were assigned to the Operator I and II classifications. The Operator III classification was left unfilled.

On March 5, the Respondent posted another notice on the employee bulletin board informing Union unit employees that the parties remained at impasse and were still far apart. As the Respondent considered the "situation unacceptable," it decided that unit employees would lock-out unit employees on March 13 until an agreement was reached. Employees were also advised to contact human resources with any questions. In response, an undetermined number of employees went to speak with Doty, asked how to resign from the Union and, if they did so, whether they could continue to work.[18]

On March 7, Doty responded to employee inquiries by posting another notice for "informational purposes" due to "questions that have been asked" about the impending lockout:

> 1) The Lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work.
>
> 2) The Company may, or may not, hire employees to work during the lockout. If it does so, those employees will be "temporary employees." What this term means is that if and when the lockout ends, GMP union members wishing to return to work will be permitted to return to work. If one of these "temporary employees" needs to be let go to make room available for a returning GMP member, then that "temporary employee will lose his or her job.
>
> 3) If there is a lockout and "temporary employees") are hired, those employees are "at-will" employees, meaning their employment can end with or without cause, with or without notice, by the choice of either the "temporary employee or the company.

[17] Jt. Exh. 14.

[18] It is undisputed that numerous employees reacted anxiously to the posting and sought to resign from the Union in order to continue working. (Jt. Exh. 15; Tr. 26, 80.)

> 4) If there is a lockout and "temporary employees" are hired, it is possible that the "temporary employee" may work the entire duration of the lockout, however long that may be — days, weeks, months, years, etc.
> 5) For a lockout to end, there must be an agreement to do so between the company and the GMP. If that situation arises, the GMP and the Company will have to negotiate that agreement.
> 6) It is an unfair labor practice for the company to make any promises of employment to anyone in advance of a lockout that might be affected by that lockout. It is an unfair labor practice for the union to coerce people to remain union members against their will.
> 7) Both the Company and GMP remain under the obligation to negotiate in good faith. The obligation to negotiate in good faith does not necessarily mean that the parties will reach an agreement. The Company is required to negotiate with the GMP negotiating committee, it cannot engage in individual negotiations with other GMP members.
> 8) The Company presented the GMP with its best, last, and final offer on February 28, 2018. To the best of the Company's knowledge, no vote has been taken nor has one been scheduled by the Union. Any questions on this topic should be directed towards your GMP officers.
> 9) Whether or not you approve or disapprove of the representation by the GMP and what, if anything, you chose to do as a result are matters of your own personal interest and the company cannot tell or advise you as to what you should or should not do.[19]

As plans for the lockout proceeded, Jacks and Doty exchanged several emails in an attempt to resume negotiations.[20] On March 9, the parties discussed the unilateral implementation of the three new job classifications. Doty asserted that the parties agreed to the three job classifications in November 2017, but Jacks countered that they had not agreed about which jobs would go into each classification and the applicable wage rates. In discussing the Operator III classification, Doty described it "like a dinner reservation, that classification couldn't have any of our people in it; it was for the die setters and their work when they came over from the IAM to the USW…." Later that night Doty emailed the Respondent's third last best and final offer to the Union. The offer, which only included items that were still left on the table, again insisted on the creation of the Operator III classification.[21]

On March 12, the Respondent posted a notice on the employee bulletin board entitled "Lockout Notice:"

> As you are aware, the Company made its best and final offer to the Union Negotiating Team on March 9, 2018. It is the Company's understanding that Union management will not permit the offer to be voted upon by its members. The negotiating team has not made any counterproposal. The collective bargaining agreement expired on November 18, 2017 and the extension expired February 28, 2018.
> Because of this, a lockout of the GMP will begin tonight, March 12, 2018, at 11 pm. As stated in the Company's earlier posting about Lockouts, The Lockout applies only to

[19] Jt. Exh. 16.
[20] R. Exh. 3.
[21] Wilds' testimony regarding the discussion between Doty and Jacks at the meeting was not disputed. (Jt. Exh. 17; Tr. 29, 78.)

> GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work.
> The Company will be hiring temporary employees during the lockout. If you wish to apply for a position, please see Darrick Doty.[22]

Prior to the lockout notice posting on March 12, three Unit employees resigned from the Union: Jeffrey Mealy, Peggy Stachura, and Danny Robertson. Within hours of the notice being posted, another three Unit employees notified the Respondent that they resigned from the Union: Joseph Birkheimer, Christopher D. Williams Jr. and Christopher D. Williams Sr.[23]

Jacks emailed Doty on March 12 charging that the lockout was illegal and reiterating the Union's desire to continue bargaining:

> As you are aware the GMP Council of the USW and its Local 152 believe that Tecnocap is about to engage in an illegal lock-out of the GMP Council/USW bargaining unit members at Tecnocap. The GMP Council/USW is actively pursuing unfair labor charges against Tecnocap which we believe win ultimately be successful. Once those charges are sustained by the National Labor Relations Board, Tecnocap will be required to compensate all of the bargaining unit members for their lost wages and benefits. Tecnocap's financial exposure as a result of the illegal lock-out will likely be very significant.
>
> The GMP Council of the USW and Its Local 152 remain willing to negotiate with Tecnocap on a successor agreement on the numerous open issues remaining including, without limitation, economics, job classifications, grievance and arbitration. We believe that there is room for both sides to move on open issues. if Tecnocap were to abandon its regressive and bad faith bargaining and were to bargain in good faith with its decision maker at the table, we are optimistic that an agreement can be reached.
>
> Unfortunately, given Tecnocap's conduct, the USW and Local 152 have been required to spend time and energy preparing for the Illegal lock-out. The membership, with the full backing of the USW, is prepared to utilize every tool at its disposal to fight for a fair and equitable contract during any illegal lock-out. Our desire however is to continue to work under the terms of the expired agreement until such time as we are able to reach agreement on a successor contract.
>
> We remain ready to negotiate. However, there are some information request that remain outstanding and we have additional requests relative to open issues. which we are asking you to address without delay. The information requests are attached.

[22] Jt. Exh. 18.

[23] The Respondent called Robertson and Williams, Jr. as witnesses, both of whom credibly testified that they resigned from the Union because of bad experiences with Union leadership. In Williams' case, he also cited his wife's critical illness and need for continued medical insurance. (Tr. 107-109, 112-113.)

> We hope that you share our desire to reach an agreement without any illegal lock-out or work stoppage and that you will respond in a timely manner to the requests and work with us to set up additional bargaining sessions.[24]

The lockout began as scheduled at 11:00 p.m. on March 12. Unit employees were refused entry, while non-Union members, including the six employees who recently resigned from the Union, were permitted to continue working and paid the higher of the wage rates set forth in the Respondent's last best and final offer or the seniority or flat rate.[25] Shortly thereafter, picket lines were set up at the facility's entrances.

On March 13 at 10:06 AM., Doty informed Wilds that the Respondent's "last, best and final offer" would expire at 11 p.m. on March 13 and that "if the union wishes to submit additional proposals, please do so via email and arrangements will be made to meet."[26] On the same day, Doty also responded to Jacks' March 12 letter:

> I am in receipt of your letter and information requests dated March 12. I am deeply disappointed that negotiations remain stalled and I continue to get the same information requests that I answered so many weeks ago. The Company is also concerned that your letter indicates that job classifications is an open issue when it was confirmed at least twice now that we have an agreement on the new three classification organization. We believe this is a showing of bad faith on the part of the Union. The Company should not constantly have to confirm and re-confirm agreements that have taken place.
>
> The Company issued its last, best and final offer last week. I understand there was a meeting over the weekend, but Union management chose not to present the offer to the membership for vote. l am hearing instead that Union management took the opportunity to intimidate, coerce and issue threats of retaliation against anyone who is considering dropping their membership.
>
> Given the circumstances, the Company had little choice but to lock out the employees. The contract has expired, the extension has expired, the Union refuses to even vote on the proposal that is on the table, and the proposals from the union are mainly regurgitations of the same old proposals that have already been rejected.
>
> You have known since last summer that the current contract language unacceptable to the Company as it prevents the operation of lines and continuation of production during break time. This issue was raised directly with both the IAM and the GMP together, in the same room, with the hopes of coming to a solution acceptable to all. Thus, all of us know that your proposal to simply continue working under the old, expired contract is not a feasible solution.
>
> We have been in negotiations for many months now. Your negotiating team is fully aware of the issues the Company is trying to resolve and why it believes its proposals will

[24] Jt. Exh. 21.
[25] These six employees were also the only employees to receive bonuses. (Jt. Exh. 30.)
[26] Jt. Exh. 20.

resolve them. To date, nothing of any real substance has been offered by the Union which addresses these outstanding issues. If the negotiating team has any desire to negotiate and propose alternatives that solve the issues that we have discussed, please send them over immediately and we can meet to discuss them. We are available to meet Monday, March 19. Otherwise, I am not sure what you believe there is to be done at this point to advance both sides towards an agreement.

In regards to your information requests, there are no projected cost-savings related to the Company's wage proposal for the life of the agreement. Instead, our wage proposal represents an average wage increase of 2.15%. The discretionary bonus has been discussed at length in negotiations and you are fully aware that it is based upon performance and the performance criteria have already been discussed. This would be an example of one of the repeating requests for information which you already possess. Another such repetitive request concerns the die setters and the IAM. Again, you are fully aware that it is the Company's intention to move the die setters to Class III Operator, something which has been discussed at length in negotiations. Negotiations with the IAM have not yet commenced as the IAM is presently unavailable to discuss the expiration of their contract. Thus, no written proposals have been exchanged between the two parties, not that you would be entitled to see any draft proposals as you are not a party to those negotiations. The manpower request has also been previously discussed and this information has already been provided to you.[27]

At some point later that day, the Union's legal counsel delivered a cease and desist letter regarding the rehiring of employees who resigned from the Union :

The Union understands that the Company has allowed bargaining unit members who have resigned their membership in the Union to work during its lockout of the GMP Council/USW bargaining unit. This is unlawful. We demand that the Company immediately cease and desist this action. The Company must either lockout the entire bargaining unit, or end this unlawful lockout and allow the entire bargaining unit back to work. If the Company persists with its unlawful conduct, the Union will take all appropriate actions to ensure this situation is properly remedied. In addition, please provide the following information by no later than noon on Friday, March 16, 2018:

- The names of any bargaining unit members who are authorized by the Company to work during the current lockout.
- Any communications between Company representatives and bargaining unit members regarding authorization to work during the current lockout.
- Any documents provided to or signed by bargaining unit members who have been granted authorization to work during the lockout regarding work as temporary replacements, including job application forms.
- A description of the conditions upon which bargaining unit members were extended the opportunity to work during the current lockout.

[27] Jt. Exh. 22.

• The terms of employment for all temporary replacements currently working in the facility, including bargaining unit members authorized to work.[28]

On March 14, Jacks responded to Doty's March 13 letter by requesting that Respondent confirm that it had withdrawn its "last, best and final offer" as of 11:00 p.m. on March 13:[29]

> Your letter states that the Company is available to negotiate on Monday, March 19. The Committee and I will meet with you on the 19th. I have reserved a meeting room at the Sleep Inn in Moundsville. I propose that we start at 9:00am. Please confirm that the Company will attend.
>
> At this difficult moment in our labor relations, it is most unfortunate that you have chosen to make an outrageous and completely false charge against the Union. You allege that at the union meeting over the weekend "Union management took the opportunity to intimidate, coerce and issue threats of retaliation against anyone who is considering dropping their membership." That allegation is utterly devoid of merit. No such thing happened. Making such scurrilous charges does not advance our mutual interest to reach an agreement.
>
> Your letter focuses on what the GMP Council of the USW refers to as the IAM issue. The Company wants to move certain IAM members into the GMP Council bargaining unit to provide the Company with continuation of production during break time. The Company's proposals relative to this issue are based on it successfully negotiating this work away from the IAM and the die setters joining the GMP Council, We believe the record makes clear that tile third classification was intended exclusively for these TAM members, although the Company now denies this. As you know, since the IAM members are not members of our bargaining unit, this is clearly a permissive subject of bargaining and one which we have advised you in the past we are unwilling — and unable – to bargain over in connection with the successor agreement. However, I have also made clear that the GMP Council would be willing to negotiate with the Company on all issues relevant to the die setters if the following occurs in a lawful manner: (1) the Company is able to get the IAM to agree to relinquish jurisdiction over the die setters, (2) the die setters join the GMP Council Local so that we can represent their interests; and (3) the Company recognizes the GMP Council as the authorized bargaining representative of the die setters. Since the Company's negotiations with the IAM have yet to commence, we do not know what the IAM or the die setters are willing to do.
>
> Notwithstanding the foregoing, we are willing to work with the Company on this paramount issue for it and address methods, practices or relief issues within the GMP Council's control that impact "continuation of production during break time" while the Company is engaged in the IAM negotiations. We invite the Company to propose alternatives that do not involve the IAM issue.

[28] Jt. Exh. 24.
[29] Jt. Exh. 23.

Likewise, from the Union perspective, as I have told you many times, the elimination of the grievance and arbitration process from the CBA is counterproductive for both sides. The Company's intransigence on this issue, after tentatively agreeing to the grievance article, is not likely, using your language, a feasible solution, and it represents bad faith and regressive bargaining. I hope the Company moves off this position on Monday to facilitate reaching an agreement.

I cannot leave unaddressed certain charges in your March 13 letter. I categorically deny that The Union has engaged in bad faith bargaining or that its information requests are somehow improper. The Union has bargained at all times in good faith and remains willing and able to bargain in good faith. On the job classification issue, I must note again that the Union agreed to three job classifications, but it remains an open issue as to which current jobs fall within each new job classification. To the extent that information requests have been repeated, it is because the Company has failed to provide the information or has provided inadequate or incomplete responses. Your response to the March 12 information request illustrates this point. The Union asked for projected cost-savings related to the Company's wage proposal. You stated there would be no cost-savings because wages on average would go up. However, that simply looks at wages earned by current employees in their current positions. The Company's proposal reduces the wages of new hires by $1.00 and eliminates most opportunities for employees to bid into higher wage positions. You do not provide projected cost-savings related to those aspects of the Company's proposal. Similarly, you do not provide the planned frequency or amounts of the proposed discretionary bonuses, or what safeguards the Company will rely on to ensure that the discretionary bonuses do not violate employment or labor laws. The Union requested more than just proposals passed to the IAM related to the Company intentions for Die Setters; your response mentions nothing about those. These are just examples of inadequate or incomplete answers that do not satisfy the Union's requests, 1 again ask that you fully respond to all the Union's information requests.

Finally, it is the Union's understanding that the Company withdrew its "last, best and final" offer ("LBF") as of 11:00 pm. March 13,2018? Can you confirm that is the case? I look forward to receiving your confirmation that the Company will be present on Monday and to the Company's response hereto.[30]

Doty did not respond to the Union's request for confirmation or tell the Union that the Respondent's offer was still on the table. On March 16, however, the Respondent's legal counsel responded to the Union's cease and desist demand of March 13:

As you know, I am counsel for Tecnocap, LLC. and have been provided a copy of your March 13, 2018 cease and desist letter wherein you request certain information. Enclosed, please find documentation relating to individuals that ended their affiliation with the Union and are currently working. Their names are Chris Williams, Jr., Peggy Stachura, Danny Robertson, Jeff Mealy, Joseph Birkheimer, and Chris Williams, Sr. I have redacted their addresses from the enclosed forms.

[30] Jt. Exh. 23.

> The information you have requested regarding temporary employees. Was provided to Pete Jacks during negotiation and thus I trust he has already shared that information with you. Similarly, I trust he has shared with you the two postings Tecnocap made regarding the lockout. I believe this answers all of your information requests. lf not, please let me know.[31]

On March 19, the parties returned to the bargaining table and the tentatively agreed to a new collective bargaining agreement.[32] That same day, the Respondent provided the Union with a payroll spread sheet.[33] On March 21, the Union informed the Respondent that the unit of employees represented by the Union ratified the agreement.

During the evening of March 21, as requested by the Union, representatives of the Respondent telephoned locked out Unit employees and directed them to return to work on March 22. In addition, the six former Unit employees were notified in writing that their temporary positions were terminated and, since March 22, those employees have also worked under the terms of the new CBA. [34]

LEGAL ANALYSIS

I. The Respondent's Declaration of Impasse

Section 8(a)(5) requires employers to bargain in good faith with their employees' collective bargaining representative. By bargaining to impasse over, and unilaterally implementing a permissive—rather than mandatory—subject of bargaining, an employer violates Section 8(a)(5). *Antelope Valley Press*, 311 NLRB 459, 460 (1993) ("because neither party is required to bargain at all over a permissive subject, a party may not lawfully bargain to impasse over a permissive subject."); see also *Borg-Warner*, 356 US. 342, 349 (1958) "[good faith bargaining] does not license the employer to refuse to enter into agreements on the ground that they did not include some proposal which is not a mandatory subject of bargaining…such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of bargaining.").

Changes merely to a bargaining unit's scope are not considered mandatory subjects of bargaining. *Idaho Statesman*, 281 NLRB 272, 276 (1986); *Antelope Valley Press,* 311 NLRB at 460 ("the scope of the unit…does not involve wages, hours, or other terms and conditions of employment, and therefore is a permissive subject. Thus, neither party may bargain to impasse over a change in the scope of the bargaining unit.").

The Respondent unlawfully declared impasse on March 1, 2018 and partially implemented its last, best and final offer by moving die-setters from the IAM into one of the Unit's classifications. This is a change affected the scope of the Unit regarding who the union represents and into what classifications those employees fall. See *Storer Communications*, 295 NLRB at 78 (1989) ("the [employer's proposed] changes do not involve who (union) represents,

[31] Jt. Exh. 25.
[32] Jt. Exh. 27.
[33] Jt. Exh. 28.
[34] Jt. Exh. 29.

but rather *what* those employees do. As such, the Respondent was not entitled to bargain to impasse over this proposal, nor to unilaterally implement it.").

The Respondent argues the contrary, citing a number of cases for the proposition that it may declare impasse when it and the union are at deadlock. Yet none of these cases involved a situation where an employer bargained to impasse over a change to the scope of a bargaining unit; on the contrary, all of them involve disputes over whether the parties had reached impasse over a mandatory subject of bargaining. *E.I. Du Pont & Co*., 268 NLRB 1075 (1984) (impasse declared over the ability to shift jobs); *Pillowtex Corp*., 241 NLRB 40, 46 (1979) ("once the parties reach impasse on a *mandatory subject* of bargaining, and no subsequent event removes the impasse, the employer, as here, would be relieved of any duty to negotiate.") (emphasis added); *Taft Broadcasting Co*., 163 NLRB 475 (1967) (impasse declared over interchangeability with respect to categories of employees, which involved the work that employees could perform, a condition of employment); *Grinnell Fire Systems*, 236 F.3d 187, 196 (4th Cir. 2000) (the dispute between the parties was over wages); *AMF Bowling Co*., 63 F.3d 1293 (4th Cir. 1995) (same); *Bahcall Industries*, 287 NLRB 1257, 1262 (1988) (same). At no point does the Respondent contend that impasse may lawfully be declared over a permissive subject, nor does the Respondent dispute that its proposal was, in fact, a change in the scope of the bargaining unit.

II. The Respondent Informed Employees That It Would Lock Out Unit Employees and Then Carried Out that Warning

A lockout is unlawful if done with anti-union animus or where the natural tendency of the lockout is to discourage union membership. *Harter Equipment*, 280 NLRB 597, 597 and 600 (1986) (lockout was not unlawful where it "did not appear that the 'natural tendency' of the lockout was to discourage union membership" and where no anti-union animus had been proven); see also *R. E. Dietz Co., 311 NLRB 1259, 1264, 1267* (1993) (proof of an employer's unlawful motive can convert an initially lawful lockout into an unlawfully motivated lockout that violates the Act). When an employer locks out only union employees while allowing non-union employees to work, the employer demonstrates such animus. *Schenk Packing Company*, 301 NLRB 487, 489 (1991) (where employer initiated a lockout of all employees who were members of the union but let ten employees who resigned from the union return to work, there was not even "a remote justification" for the lockout, despite employer's desire to avoid spoilage of its product, because the lockout discouraged unit employees' membership in the union).

Here, the Respondent's employee bulletin board postings on May 5, 7 and 12, 2018 violated Section 8(a)(1) of the Act. By providing notice to employees that their ability to continue to work would depend on whether or not they were members of the Union, the Respondent created a situation where employees would feel jeopardized if they did not resign. *Schenk Packing Co*., 301 NLRB at 489 (1991) (employer unlawfully "create[d] a situation in which employees would tend to feel imperiled should they refrain from resigning [from the union]" by making a statement that only non-union members would be hired as replacements during a pending lockout). The Respondent suggests that because the record lacks concrete evidence that the employees who resigned their union membership did so because of the Respondent's threat of a lockout, there is no basis to conclude that the lockout was unlawful. This is an inaccurate understanding of the Act; the test for whether an employer's action chills

union activity is an objective, not subjective one—whether the employer's conduct *tends to* cause employees to feel imperiled, not whether they actually so feel. Id.

By locking out only those employees who remained members of the Union from March 12 through March 21, 2018, the Respondent made good on its threats and drew a distinction between employees who performed the same kind of work, were subject to the same CBA, and had the same interest in the contract proposals that led to the lockout—a distinction based entirely on union affiliation. *Schenk Packing Co*., 301 NLRB at 489 (employer had not even "a remote justification" for a lockout that distinguished on the basis of union membership); *McGiwer Co., Inc.*, 204 NLRB 492, 496 (1973) (finding that an employer acted unlawfully in locking out only those employees who, by striking, had identified themselves as union adherents while continuing to operate with other employees). Thus, the Respondent's conduct effectively discouraged union membership in violation of Section 8(a)(3). *Schenk*, 387 NLRB at 490 ("we conclude that an unavoidable effect and, hence, unstated purpose of the lockout was to discourage unit employees' membership in the Union by denying employment to those who maintained that status.")

The Respondent's reliance on the principle that employees have the right to freely resign from union membership, citing *United Mine Workers of America (Canterbury Coal Company*), 305 NLRB 516, 519 (1991) (employees "had a statutory right to resign their union membership and return to work for their employer during the strike"), is irrelevant. In that case, the Board found that the union violated Section 8(b)(1)(A) by discriminatorily applying a strike fund reimbursement rule against members who resigned their union membership and refrained from taking part in strike activity. The issue here, however, is not whether the Union's actions restrained unit employees from exercising their rights to refrain from union activity, but rather, the *employer's* actions effectively restraining employees from exercising their rights to engage in union activity. West Virginia's *Workplace Freedom Act* (WV Code 21-5G-1), also cited by the Respondent for the principle that employees have the "right to refrain from affiliating with a labor organization," merely confirms that employees have the right to be free of coercion when deciding whether or not to engage in union activity.

Finally, as discussed above, the Respondent's lockout was initiated with the goal of compelling employees' acquiescence with a contract proposal upon which the Respondent had no right, under the Act, to insist. Locking out employees for the purpose of compelling acceptance with an employer's unlawfully implemented final offer is prohibited by the Act. *Royal Motor Sales*, 329 NLRB 760, 765 (1999) (citing *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) ("The Board has held… that an employer violates 8(a)(5) and (1) of the Act when it locks out employees for the purpose of…compelling acceptance of its unfair labor practices."). In fact, the Board has specifically held that an employer may not lock out employees in order to force a union to accede to demands regarding changes in the scope of a bargaining unit. *Greensburg Coca-Cola Bottling Co*., 311 NLRB 1022, 1023 (1993) (*enf. denied*, *NLRB v. Greensburg Coca-Cola Bottling Co., Inc.*, 40 F.3d 669, 674 (3d Cir. 1994) (denied on basis of finding that the record showed the Company had not been, in fact, insisting on a proposal to impasse). Thus, even if the Respondent's lockout did not violate the Act by unlawfully discouraging union membership—which it does—it would still be unlawful.

III. The Respondent Failed to Inform the Union About How to End the Lockout

A fundamental principle of any lockout is that the employer provide the union with clear terms such that the union, by acceding to them, may end the lockout. *Dayton Newspapers*, 339 NLRB 650, 656-67 (2003) (aff'd in relevant part 402 F.3sd 651 (2005) (a fundamental principle underlying any lawful lockout is that the union may end the lockout, and return the employees to work, by agreeing to the employer's demands); see also *Eads Transfer, Inc*., 304 NLRB 711, 712 (1991) (employer found to have acted unlawfully by not responding to strikers' requests for reinstatement (thereby changing the strike into a lockout) because the strikers could not knowingly reevaluate their position and decide whether to accept the employer's terms); *Boehringer Ingelheim Vetmedica*, 350 NLRB 678 (2007) ("Respondent's demands must be sufficiently clear" or an otherwise lawful lockout can become unlawful).

Here, the Respondent withdrew its last, best and final offer, but left the lockout in place, leaving the Union with no clear demand to which to accede—and no clear means of ending the lockout. *Dayton Newspapers*, 339 NLRB at 656 (employer violated Section 8(a)(5) by failing to give the Union a clear set of terms for reinstatement of its employees).

The Respondent argues that the withdrawal of its offer on March 13, 2018 was not to be taken seriously but was merely a bold statement made to convey the seriousness of the offer—and thus, that the Respondent met its burden under *Dayton* because the Union should have known that the way to end the lockout was to accede to that offer. Yet the Respondent's assertion that the Union should not have taken the withdrawal of the offer seriously falls apart in light of the fact that the Union specifically reached out to the Respondent on March 14, stating in writing its belief that the final offer had been withdrawn, and asking for confirmation of that fact. The Respondent did nothing to correct the Union's belief; it simply failed to reply. The Respondent had the opportunity to put its offer—or another offer—back on the table, and by not doing so, it failed to offer the Union the terms necessary to end the lockout, in violation of Sections 8(a)(5) and (1).

The fact that the Company offered a proposal on March 19 does not cure the violation. Unless the employer remedies the harmful effects of the lockout on the employees by restoring the status quo ante, a lockout that is unlawful at its inception retains the taint of illegality until it ends, and the affected employees are made whole. *Alden Leeds, Inc.*, 357 NLRB 84, 84 fn. 3 (2011) ("it is well established that a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole"); *Movers and Warehousemen Ass'n of Washington, D.C*., 224 NLRB 356, 358 (1976) (where an employer failed to offer reinstatement to locked-out employees, never offered backpay, and never acknowledged its wrongdoing, the unlawful effects of the lockout had not been mitigated).

IV. Respondent Dealt Directly with Unit Employees

An employer violates Section 8(a)(5) and (1) of the Act when it bypasses a union and deals directly with its employees. *El Paso Electric Co*., 355 NLRB 544, 545 (2010). Direct dealing occurs (1) when an employer communicates directly with represented employees, (2) for

the purpose of changing wages, hours, or terms and conditions of employment or undercutting the union's role in bargaining, and (3) the communication excludes the union. Id.

The Respondent created the framework to deal directly with unit employees by posting its repeated notices on March 5, 7 and 12, 2018, informing them of the impending lockout, advising them that the Respondent was "at [their] disposal to answer any questions they may have," and instructing them to see Doty if they wished to seek a temporary position during the lockout. These notices accomplished their intended effect by causing unit employees to approach Doty to ask what they needed to do to continue working. Doty then drafted letters of hire for six employees who wished to resign their union membership and continue working on a temporary basis**.** Although these employees had resigned their union membership, they were still part of the bargaining unit. As such, the Respondent communicated directly with represented employees, thereby satisfying the first *El Paso* factor. The second factor was met by the fact that the letters altered these employees' status to that of at-will employees, thereby affecting their rights related to discharge; discharge is a term and condition of employment. E.g., *Malone & Burkheimer dba Sorrento Hotel*, 266 NLRB 350 (1983) (successor employer unlawfully discharged predecessor's employees without bargaining). Finally, the Respondent did this without consulting the Union, satisfying the third *El Paso* factor.

The Respondent did not have the authority to offer any other work terms to employees—such as the opportunity to work at will—besides those existing under the CBA before the lockout. See *Dayton Newspapers*, *Inc*., 339 NLRB at 653 (discussing *U.S. Ecology Corp*., 331 NLRB 223 (2000) (an employer reaching out to communicate with employees regarding their return to work after a lockout may only state the same terms that existed prior to the lockout; the Board held that additional terms beyond a simple offer of reinstatement erode the Union's position as exclusive representative). Here, the Respondent, in offering a change in employees' terms that it had no right to offer, circumvented the Union and engaged in direct dealing in violation of Section 8(a)(5) and (1) on March 5, 7 and 12, 2018 .

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and served the relevant times herein as the exclusive labor representative for the following bargaining unit employees employed by the Respondent:

> All hourly rated production and maintenance employees, including warehousemen; except employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

3. By discouraging membership in the Union by telling employees that we will only lockout union members and impliedly solicit their resignations from the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By discouraging membership in the Union by locking out unit employees who are members of the Union while permitting unit employees who are not members of the Union to continue working, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by: (1) failing to obtain the Union's consent prior to unilaterally implementing its proposal on a permissive subject of bargaining; (2)) locking out Union members in support of a demand that the Union agree to a contract provision to change the scope of the bargaining unit, a permissive subject of bargaining; (3) bypassing the Union and dealing directly with unit employees by soliciting employees to enter into individual employment contracts offering employees employment during a partial lockout on the condition that they abandon their membership in the Union; and (4) partially implementing its last, best and final offer by establishing new job classifications without reaching good faith impasse; and failing and refusing to reinstate its locked-out employees without giving the Union clear conditions for reinstatement.

6. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including making whole Unit employees whom it discriminatorily locked out from March 12 through 21, 2018 for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

ORDER

The Respondent, Tecnocap LLC, Glen Dale, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the Union by telling employees that the Respondent will only lockout union members and impliedly soliciting their resignations from Union;

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Discouraging membership in the Union by locking out unit employees who are members of the Union while permitting unit employees who are not members of the Union to continue working;

(c) Failing to obtain the Union's consent prior to unilaterally implementing its proposal on a permissive subject of bargaining;

(d) Locking out Union members in support of a demand that the Union agree to a contract provision to change the scope of the bargaining unit, a permissive subject of bargaining;

(e) Bypassing the Union and dealing directly with unit employees by soliciting employees to enter into individual employment contracts offering employees employment during a partial lockout on the condition that they abandon their membership in the Union;

(f) Partially implementing its last, best and final offer by establishing new job classifications without reaching good faith impasse;

(g) Failing and refusing to reinstate its locked-out employees without giving the Union clear conditions for reinstatement, and;

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole those employees who were unlawfully locked out from March 12 through March 21, 2018, for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from March 12 through March 212, 2018, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons,* 283 NLRB 1173 (1987).

(b) Remove from its files any reference to the unlawful lockout as it pertains to each affected employee and notify the employee in writing that this has been done and that the lockout will not be used against him/her.

(c) Within 14 days after service by the Region, post at its Glen Dale, West Virginia facility copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed

[36] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region Six a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. April 5, 2019

Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL-CIO, CLC ("Union") is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

All hourly rated production and maintenance employees, including warehousemen, except employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

WE WILL NOT solicit your resignations from membership in the Union.

WE WILL NOT discourage membership in the Union by permitting employees who have resigned from the Union to work while locking out employees who are union members.

WE WILL NOT select for lockout our unit employees who are members of the Union while permitting our unit employees who are not members of the Union to continue working during a partial lockout.

WE WILL NOT bypass your Union and deal directly with you by offering you employment during a partial lockout on the condition that you abandon your membership in the Union.

WE WILL NOT fail to notify the Union during a partial lockout of the terms under which the partial lockout could be ended.

WE WILL NOT make changes to the scope of your bargaining unit without first obtaining the consent of your Union.

WE WILL NOT lock out Union members over our demand to change the scope of your bargaining unit.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make whole those employees whom we selected for lockout for all losses they suffered because of our having unlawfully locked them out from March 12, 2018 through March 21, 2018.

TECNOCAP LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

William S. Moorhead Federal Building, Room 904, Pittsburgh, PA 15222-4111

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-216499 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (412) 690-7117.